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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 728

TITION NOT PRINTED

PONSE NOT PRINTED

ROBERT DEAN DICKEY,

Petitioner,

vs.

FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF FLORIDA, FIRST DISTRICT

BRIEF FOR THE PETITIONER

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INDEX

SUBJECT INDEX

	Page
Opinions Below	1
Jurisdiction	1
Constitutional Provisions and Statutes Involved	2
Questions Presented	3
Statement of the Case	3
Summary of Argument	6
ARGUMENT:	
I. Florida Had a Constitutional Duty to Give Petitioner a Speedy Trial as Required by the Sixth and Fourteenth Amendments to the United States Constitution	8
II. A Delay of Eight Years in Granting Trial Is Denial of the Right to Speedy Trial as Guaranteed by the Sixth Amendment to the Constitution When the Delay Results in Prejudice to the Accused's Defense and Person	17
III. The Denial of the Right to a Speedy Trial Should Result in Absolute Discharge of Petitioner	23
Conclusion	25
APPENDIX "A"	27
APPENDIX "B"	31
Certificate of Service	33

Table of Authorities

Page

CASES:

Arrowsmith v. *State*, 175 S.W. 545 (Tenn. 1915) 18, 20

Barber v. *Page*, 390 U.S. 719 (1968) 11

Bell v. *State*, 220 So.2d 287 (Miss. 1969) 18, 20, 24

Bruce v. *United States*, 351 F.2d 318 (5th Cir. 1965) 14

Dickey v. *Circuit Court*, 200 So.2d 521 (Fla. 1967) 4, 8, 9, 10, 11, 17

Dickoff v. *Dewell*, 9 So.2d 804 (Fla. 1942) 10, 23

Ex parte Vacca, 271 P.2d 162 (Calif. 1964) 13

Feger v. *Fish*, 143 So. 605 (Fla. 1932) 8, 10

Foley v. *United States*, 290 F.2d 562, 565 (8th Cir. 1961) 15

Gideon v. *Wainwright*, 372 U.S. 335 (1963) 13

Gossett v. *Hanlon*, 195 So.2d 865 (Fla. 1967) 8, 10, 15

Hanrahan v. *United States*, 348 F.2d 363 (D.C. Cir. 1965) 12, 15

Harlow v. *United States*, 301 F.2d 361, 366 (5th Cir. 1962) 14

Hoopengarner v. *United States*, 270 F.2d 465 (6th Cir. 1959) 14

Jacobsen v. *Winter*, 415 P.2d 297, 300 (Idaho 1966) 15

Jones v. *State*, 164 So.2d 799 (Miss. 1964) 18, 20, 24

Kelly v. *State*, 54 So.2d 431 (Fla. 1951) 10

Kemp v. *State*, 177 So.2d 58 (Fla. 1965) 10

Keyes v. *State*, 202 A.2d 582 (Md. 1964) 14

Klopfer v. *North Carolina*, 386 U.S. 213 (1967) 8, 12

Loy v. *Grayson*, 99 So.2d 555 (Fla. 1957) 10

Page

Marshall v. *United States*, 337 F.2d 119 (D.C. Cir. 1964) 13

McGeachy v. *State*, 6 So.2d 823 (Fla. 1942) 8

Miranda v. *Arizona*, 384 U.S. 436 (1966) 13

Needle v. *Scafati*, 289 F.Supp. 1006 (1968) 18, 22

Pellegrini v. *Wolfe*, 283 S.W.2d 162 (Ark. 1955) 9, 24

People v. *Bryarly*, 178 N.E.2d 326 (Ill. 1961) 9, 18

People v. *Echols*, 271 P.2d 595 (Calif. 1954) 13

People v. *Prosser*, 130 N.E.2d 891 (N.Y. 1955) 23

Pollard v. *United States*, 352 U.S. 354 (1957) 10, 12

Ponzi v. *Fessenden*, 258 U.S. 254 (1922) 9

Rosengarten v. *State*, 171 So.2d 591 (Fla. 1965) 14

Ryan v. *State*, 197 So.2d 37 (Fla. 1967) 10

Smith v. *Hooey*, 393 U.S. 374 (1969) 9, 16, 17, 18

State v. *Artz*, 191 N.W. 605 (Minn. 1923) 24

State v. *Cooper*, 157 So.2d 875 (Fla. 1963) 8

State v. *Kuhnhauser*, 272 P.2d 225 (Ore. 1954) 13

State v. *Lee*, 419 P.2d 927 (1966) 14

State v. *Milner*, 149 N.E.2d 189 (1958) 8, 18, 20, 24

State ex rel. Fredenberg v. *Byrne*, 123 N.W.2d 305 (Wis. 1963) 15

Taylor v. *United States*, 238 F.2d 259 (D.C. Cir. 1956) 9, 18, 20

United States v. *Chase*, 135 F.Supp. 230 (N.D. Ill. 1955) 7, 18, 20, 21, 24

United States v. *Dillion*, 183 F.Supp. 541 (S.D. N.Y. 1960) 23, 24

United States v. *Ewell*, 383 U.S. 116, 15 L.ed.2d 627 (1966) 10, 12, 15, 18

United States v. *Lustman*, 258 F.2d 475 (2d Cir. 1958) 22

United States v. *McWilliams*, 69 F.Supp. 812 (D.D.C. 1946) 20

Page

United States v. *McWilliams*, 163 F.2d 695 (D.C. Cir. 1947) 18, 20, 24

United States v. *Provoo*, 17 F.R.D. 183 (D. Md. 1955) 12, 18, 20, 24

United States v. *Richardson*, 291 F.Supp. 441 (1968) 18, 20

Williams v. *United States*, 250 F.2d 19 (D.C. Cir. 1957) 18, 24

Wilson v. *State*, 194 So.2d 33 (Fla. 1967) 10

STATUTES:

Florida Constitution, Section 11 8

Florida Statutes, 915.01 ..... 6, 10, 11, 23

Florida Statutes, 915.02 ..... 6, 9, 10, 11, 23

Florida Statutes, 932.05 16

Florida Statutes, 941.05 9

18 U.S.C., Section 3282 16

18 U.S.C., Section 4085 9

28 U.S.C., Section 1257(3) 2

United States Constitution, Sixth Amendment .. 1, 2, 3, 5, 8, 17, 22

United States Constitution, Fourteenth Amendment 1, 2, 3, 5, 8

OTHER AUTHORITIES:

A.B.A. Project, *Standards Relating to Speedy Trial* (Appr. Draft, 1968) 16, 21, 23

Note, *Continuances in the Cook County Criminal Courts*, 35 U.Chi.L.Rev. 259 (1968) 21

Note, *Effective Guaranty of a Speedy Trial for Convicts in Other Jurisdictions*, 77 Yale L.J. 767 (1968) 15, 19

Page

Note, *The Lagging Right to a Speedy Trial*, 51 Va. L.Rev. 1587 (1965) 9, 16, 18

Note, *The Right to a Speedy Criminal Trial*, 57 Col. L.Rev. 846 (1957) 13

Note, *The Right to a Speedy Trial*, 20 Stan.L.Rev. 476 (1968) 15, 23

Schindler, *Interjurisdictional Conflict and the Right to a Speedy Trial*, 35 U.Cin.L.Rev. 179 (1966) 22

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Opinions Below

The opinion of the District Court of Florida, First District, is reported in 215 So.2d 772 (1968).

Jurisdiction

After conviction, petitioner filed a direct appeal to the Florida District Court of Appeal, First District, challenging the denial by the trial court of petitioner's Motion to Quash, based upon the Sixth and Fourteenth Amendments to the United States Constitution. Petitioner's claim under the Sixth and Fourteenth Amendments was properly pre-

sented (S.* K), and was denied by the Florida District Court of Appeal, First District, on November 21, 1968 (A. 46). The Petition for a Writ of Certiorari was filed February 18, 1969, and was granted October 13, 1969. The jurisdiction of this Court rests on 28 U.S.C., Section 1257 (3).

Constitutional Provisions and Statutes Involved

The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence.

Section One of the Fourteenth Amendment provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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* S. refers to Stipulation of Facts found in Appendix "A."

Questions Presented

1. Was petitioner denied the right to speedy trial as guaranteed by the Sixth Amendment in conjunction with the Fourteenth Amendment when he was tried eight years later, during which time witnesses could not be located, others had died, and evidence was destroyed?

2. Does the Constitution require dismissal of a state criminal charge for the state's failure to grant a person a speedy trial?

Statement of the Case

The present case arises out of a charge of robbery for which the petitioner was tried and convicted on February 13, 1968. A direct appeal was taken to the Florida District Court of Appeal, First District, on the denial of petitioner's Motion to Quash the Information (S. K). The appeal was denied by the Florida District Court of Appeal, First District, on November 21, 1968 on all issues raised (A. 46).

On July 1, 1960, a deputy sheriff filed an affidavit, charging petitioner with robbery of Clark's Motor Court, Gadsden County, Florida, on June 28, 1960 (S. A). The same date, the Justice of the Peace issued a warrant for petitioner's arrest and placed the warrant in the deputy sheriff's hands (A. 3). Petitioner was being held in the Jackson County, Florida Jail on federal charges for robbery (S. D). The Jackson County Jail is in a county which is adjacent to Gadsden County, Florida. Petitioner was in Florida from July 1, 1960 until September 2, 1960, when he was removed from the State of Florida to a federal penitentiary (S. D).

On July 1, 1960, the petitioner was identified in the Jackson County Jail by an eyewitness in the presence of the deputy sheriff who had executed the affidavit. The Jackson County jailer was present when petitioner was identified (S. I). On September 2, 1960, the Sheriff of Gadsden County filed a detainer with federal authorities in Atlanta, Georgia, charging petitioner with robbery (S. E). From September, 1960 until January 23, 1968, petitioner was held in federal custody, but was returned to Florida on January 23, 1968 for trial (S. E). On October 29, 1962, while in federal custody, petitioner filed a Writ of Habeas Corpus Ad Prosequendum, requesting a speedy trial on the charges or requesting that the detainer be dropped by Florida (A. 6). The court denied the Writ on December 1, 1962 (A. 12). Subsequent writs were filed on April 1, 1963 and March 28, 1966 (A. 14, 20). All were denied by the court (A. 19, 23). Petitioner filed an original mandamus proceeding in the Florida Supreme Court; and the Florida Supreme Court, in an opinion dated June 14, 1967, held that the State should drop the detainer or return petitioner to Flordia for trial, *Dickey* v. *Circuit Court,* 200 So.2d 521 (1967). Petitioner was given leave to file a new writ. On September 1, 1967, petitioner filed a motion that charges be dismissed against him on the basis of denial of a speedy trial (A. 23). The prosecuting attorney, on December 15, 1967, obtained an ex parte order allowing the petitioner to be returned to Florida from federal custody on January 23, 1968 for the charge of robbery (A. 26). On January 23, 1968, the Public Defender was appointed to represent petitioner, whose trial was then scheduled for January 31, 1968 (S. G). On January 30, 1968, petitioner moved to quash the information on two grounds: (1) he was denied the right to a speedy trial

under the Sixth Amendment, and (2) the Florida statute of limitations had run (A. 33). This motion was denied by the court on February 13, 1968 (A. 40). Petitioner filed a Motion for Continuance on January 30, 1968, alleging inability to locate two defense witnesses (A. 31). The motion was granted (S. L). The trial was rescheduled for February 13, 1968, and a second Motion for Continuance was filed February 12, 1968, alleging defense witness could not be found (A. 38). The court denied this motion, and ordered petitioner to trial on February 13, 1968 (S. H).

During the trial, the eyewitness to the robbery testified as to petitioner's description from memory of eight years earlier (A. 41-42), as did the deputy sheriff (A. 43-45). The deputy sheriff wrote down the description given to him by the eyewitness, but admitted destroying those notes several years later (A. 44).

The petitioner was convicted and sentenced to ten years in the Florida Penitentiary, the sentence to run consecutively to existing sentences (S. J). Petitioner alleged error to the Florida District Court of Appeal for denying petitioner's Motion to Quash for lack of speedy trial, based on the Sixth and Fourteenth Amendments to the United States Constitution. The District Court of Appeal affirmed the conviction (A. 46).

The petitioner's Writ of Certiorari was filed in this Court on February 18, 1969. On October 13, 1969, the Court granted the Motion for Leave to Proceed in Forma Pauperis and granted petitioner's Writ of Certiorari (A. 47).

Summary of Argument

1. A state charge had been pending against petitioner since 1960. He was tried and convicted in 1968. The State had failed to try him between 1960 and 1968 because he was confined in a federal penitentiary. Petitioner had filed written requests in 1962, 1963, and 1966 that the detainer be dropped or that he be returned to Florida for trial. All requests were denied until the Florida Supreme Court on June 14, 1967 ordered that petitioner be tried or that the detainer be dropped. The petitioner was returned to Florida on January 23, 1968 to stand trial for the robbery charges. Prior to trial, petitioner moved to quash the information on the basis he was denied the right to a speedy trial because of the eight year delay. The motion was denied by both the trial and the appellate courts.

2. Florida has never applied the right to speedy trial to those incarcerated outside the state who have Florida charges pending against them. Florida had laws on its books (915.01 and 915.02, F.S.*) which would permit the accused to demand a speedy trial if no statutory excuse existed.

Florida did not lack the authority to return petitioner for trial because statutory and case decisions clearly held that a state could obtain a prisoner held in federal custody for trial on state charges. The State's delay in trying petitioner was oppressive and vexatious, and no excuse existed for the delay in trial.

There has been a split of authority as to when the right to speedy trial attaches. Some jurisdictions have held

* F.S. denotes Florida Statutes.

this right begins at the commencement of the prosecution. Other jurisdictions hold this right begins when the indictment or information has been filed. The right to a speedy trial should apply at the commencement of prosecution since the statutes of limitations are not uniform in all jurisdictions. Also the statutes of limitations do not deal with the element of unnecessary delay.

3. The delay in trying petitioner for eight years resulted in prejudice to petitioner's defense because a witness had died, another could not be located, and some evidence was destroyed. Where prejudice to the defense occurs after long delay, this is sufficient to dismiss the charges based on the proposition that the accused was denied a right to speedy trial. Both federal and state courts have followed this principle. Another reason why long delay is bad is because it is detrimental to the guilt determination process regardless of which side secures the advantage. This principle was recognized in *United States* v. *Chase,* 135 F.Supp. 230 (N.D. Ill. 1955).

In addition to the accused and the state, the community has an interest in early trials. Otherwise, the deterrent effect of conviction is lost. The burden should be on the state to show no prejudice as a result of undue delay because the accused probably would not be in a position to prove factors needed to show prejudice. Some jurisdictions have recognized that the burden to show prejudice should be on the prosecution.

4. An eight year delay in the trial of petitioner should result in dismissal of the charges and serve as a bar to future prosecution. The A.B.A. has recommended this practice. Petitioner never had a fair trial because of the unnecessary delay.

ARGUMENT

I.

Florida Had a Constitutional Duty to Give Petitioner a Speedy Trial as Required by the Sixth and Fourteenth Amendments to the United States Constitution.

In *Klopfer* v. *North Carolina,* 386 U.S. 213 (1967) it was held that the right to speedy trial was "as fundamental as any of the rights secured by the Sixth Amendment", and was binding on the states. This right has been adopted by the fifty State Legislatures into their constitutions. In *State* v. *Milner,* 149 N.E.2d 189 (1958) the court, in speaking of delay said:

> "'It has always been the policy of our law to guarantee the accused a speedy public trial, since past experience has demonstrated that a prosecution too long delayed often amounts to persecution . . .'". p. 191

Florida adopted the right to speedy trial almost word for word from the United States Constitution. Section 11, Declaration of Rights, Florida Constitution. *McGeachy* v. *State,* 6 So.2d 823 (Fla. 1942). Based upon previous decisions by the Florida courts, this right was to apply only to those individuals within the state. *State* v. *Cooper,* 157 So.2d 875 (Fla. 1963); *Gossett* v. *Harllon,* 195 So.2d 865 (Fla. 1967); *Feger* v. *Fish,* 143 So. 605 (Fla. 1932). Florida had never defined the right to speedy trial for persons charged with a crime who were incarcerated outside Florida until petitioner filed original mandamus proceedings in the Florida Supreme Court, *Dickey* v. *Circuit Court,* 200 So.2d

521 (Fla. 1967). In *Dickey, supra,* the Supreme Court of Florida determined that a person incarcerated outside the state, charged with a Florida crime, was entitled to be returned for trial. The State then had an affirmative duty to accord petitioner the constitutional right to a speedy trial.

It may be argued that prior to the establishment of the principle in *Smith* v. *Hooey,* 393 U.S. 374 (1969), the states lacked constitutional authority to return a person for trial who was incarcerated in another jurisdiction. However, prior to the decision in *Dickey* v. *Circuit Court,* 200 So.2d 521 (Fla. 1967), there was ample authority that a state could return prisoners for trial, particularly where the accused was in federal custody. 18 United States Code 4085; *Ponzi* v. *Fessenden,* 258 U.S. 254 (1922). Decisions prior to *Smith* v. *Hooey, supra,* recognized the doctrine that one sovereign was under a duty to accord an accused the right to trial if the accused were outside the demanding jurisdiction. *People* v. *Bryarly,* 178 N.E.2d 326 (Ill. 1961); *Pellegrini* v. *Wolfe,* 283 S.W.2d 162 (Ark. 1955); *Taylor* v. *United States,* 238 F.2d 259 (D.C. Cir. 1956). Florida also had a statute on its books (941.05, F.S.) providing for the return of a prisoner from another state in order to stand trial.

It has been recognized that in order to secure the right to a speedy trial one must demand this or else it is waived. Note, *The Lagging Right to a Speedy Trial,* 51 Va.L.Rev. 1587, 1601-1610 (1965).

Section 915.02, F.S., is designed to implement the right to speedy trial. However, before 915.02, F.S., becomes operative, such as to require dismissal of the charge, the

accused must have entered three successive demands for trial for three successive terms of court. Once the accused complies with this requirement, the statute requires that the charge be dismissed if he is not brought to trial. *Feger* v. *Fish,* 143 So. 605 (Fla. 1932); *Dickoff* v. *Dewell,* 9 So.2d 804 (Fla. 1942); *Gossett* v. *Hanlon,* 195 So.2d 865 (Fla. 1967). The accused is obligated under 915.01 and 915.02, F.S., to make three separate demands for trial for three successive terms of court to secure a dismissal; if no demand is made, the statutes do not operate. *Kelly* v. *State,* 54 So.2d 431 (Fla. 1951); *Loy* v. *Grayson,* 99 So.2d 555 (Fla. 1957); *Kemp* v. *State,* 177 So.2d 58 (Fla. 1965); *Wilson* v. *State,* 194 So.2d 33 (Fla. 1967); *Ryan* v. *State,* 197 So.2d 37 (Fla. 1967). In *Dickey* v. *Circuit Court, supra,* the opinion is silent as to whether Dickey had waived the constitutional right to a speedy trial.

The demand doctrine would look to the actions of the accused, whereas excusable delay would look to the actions of the court or the prosecutor to determine whether there was denial of the right to speedy trial.

In *Pollard* v. *United States,* 352 U.S. 354 (1957), only those delays which were not "purposeful and oppressive" are excusable. Again, this court in *United States* v. *Ewell,* 383 U.S. 116, 120, 15 L.ed.2d 627 (1966), said that:

> ". . . 'The delay must not be purposeful or oppressive. . . .' '(T)he essential ingredient is orderly expedition and not mere speed.'" p. 631

Eight years' lapse between the charging of petitioner and his trial cannot be justified on grounds of excusable delay. The argument that the federal authorities holding petitioner might not have granted the request of Florida to

try him, was struck down in another Sixth Amendment case, *Barber* v. *Page,* 390 U.S. 719 (1968). This court stated:

> "We start with the fact that the State made absolutely no effort to obtain the presence of Woods at trial other than to ascertain that he was in a federal prison outside Oklahoma." p. 723

Had Dickey been within the borders of Florida, his request for speedy trial would have been sufficient, assuming no excusable statutory grounds existed. See 915.01, F.S. Dickey could have secured a speedy trial even if he had been in a Florida jail on another offense. See 915.02, F.S. It is difficult to determine from *Dickey* v. *Circuit Court, supra,* whether the prosecutor or the lower court was excused for the long delay because of the mistaken belief that no authority existed for Dickey's return and that Dickey's right to speedy trial did not begin until that decision. Yet, the Florida Supreme Court in *Dickey, supra,* recognized that delay could in some cases invalidate a conviction.

> ". . . it follows that failure of the accusing state to so act might well invalidate any judgment ultimately obtained on such charges if the time lapse is sufficiently great and is not excused." p. 526

Apparently, the court, in *Dickey, supra,* was unwilling to find unconstitutional, oppressive or vexatious actions which resulted in delay of the trial to those persons incarcerated outside the borders of Florida.

> "The petitioner on three previous occasions has, by petition lodged with the circuit court in that county, requested that he be brought back for trial on that

charge. We will not in this case go as far as Arkansas would." p. 526

It makes no difference whether the delay was attributable to inaction on the part of the prosecutor or on the part of the lower court. The harm that has been done to the accused because of the unnecessary delay cannot be changed. An unnecessary delay in trial should be unconstitutional when such actions are "purposeful," "arbitrary," or "vexatious" regardless of who is causing the delay. *Klopfer* v. *North Carolina,* 386 U.S. 213 (1967); *United States* v. *Ewell,* 383 U.S. 116, 120, 15 L.ed.2d 627 (1966); *Pollard* v. *United States,* 352 U.S. 354 (1957).

The doctrine of delay by the government has been recognized as a denial of speedy trial. In *Klopfer, supra,* the holding indicates that delaying actions are sufficient to show a denial of speedy trial without the necessity of showing prejudice. In *United States* v. *Provoo,* 17 F.R.D. 183 (D. Md. 1955), the delay was construed to be intentional where the government had sought the wrong venue and petitioner had been in jail over five years. In *Hanrahan* v. *United States,* 348 F.2d 363 (D.C. Cir. 1965) the court, while not reversing the conviction, felt that negligence on the part of the government, resulting in unnecessary delay, might invalidate a trial.

It would seem that "oppressive," "purposeful" or "arbitrary" acts resulting in a long delay should constitute a denial of the constitutional right to speedy trial. If the actions of the respondent resulted in unnecessary delay, a constitutional denial of speedy trial should be afforded Dickey without the showing of any prejudice. It would be quite difficult to say that respondent did everything in its

power to protect the right of speedy trial for Dickey. If the state has the duty to furnish counsel, to advise the accused to remain silent, then the duty exists to speedily try the accused. *Gideon* v. *Wainwright,* 372 U.S. 335 (1963); *Miranda* v. *Arizona,* 384 U.S. 436 (1966).

While most jurisdictions recognize that oppressive and vexatious actions by a prosecutor can result in a denial of speedy trial, there still is conflict as to whether actions by the courts can result in a denial of speedy trial.

The view that court delay is excusable is found in *State* v. *Kuhnhauser,* 272 P.2d 225 (Ore. 1954), involving a six months' delay because of attention to civil cases. The other view that court delay is not excusable is found in *Ex parte Vacca,* 271 P.2d 162 (1964); *People* v. *Echols,* 271 P.2d 595 (1954). Note, *The Right to a Speedy Criminal Trial,* 57 Col.L.Rev. 846, 858 (1957). However, delay by the court has resulted in dismissals. In *Marshall* v. *United States,* 337 F.2d 119 (D.C. Cir. 1964), where a series of long continuances had been granted and there was failure to arrange the court calendar, dismissal was ordered.

A final argument may be raised that the whole question of long delay is moot because the right to speedy trial only attached when the information was filed in December, and the accused was tried approximately three months later.

On July 1, 1960 a warrant was issued by Gadsden County, Florida for petitioner's arrest. Although petitioner was being held on federal charges in an adjoining Florida county during the months of July and August, 1960, the deputy sheriff who had investigated the case, who visited petitioner in jail, and who later obtained the arrest warrant, made no effort whatsoever from July until September,

1960 to execute the warrant. While Dickey was outside the state, the only action taken by respondent was the filing of a detainer with the federal authorities on charges of robbery. From September 1960 until December 15, 1967, respondent took no action with regard to returning petitioner to Florida for trial. During this period, the accused filed three written requests for speedy trial—one in 1962, one in 1963, and another in 1966. Only after original mandamus proceedings in the Florida Supreme Court did respondent obtain an order on December 15, 1967 for petitioner to be returned for trial. On the same day respondent filed an information charging Dickey with a robbery, which occurred on June 28, 1960.

In Florida prosecution for an offense is begun when a warrant is placed in the hands of a proper person for execution. This is done in order to stop running of the statute of limitations. *Rosengarten* v. *State,* 171 So.2d 591 (Fla. 1965).

The argument can be raised that the constitutional right to a speedy trial does not arise until a formal charge by indictment or information has been filed. The period between the arrest and formal charge is governed by the statute of limitations in some states, and is not subject to the constitutional right to a speedy trial. There has been a division of opinion in state and federal jurisdictions on this question. The view that the right to a speedy trial attaches only when a person has been formally charged, has been followed in *Bruce* v. *United States,* 351 F.2d 318 (5th Cir. 1965); *Hoopengarner* v. *United States,* 270 F.2d 465 (6th Cir. 1959); *State* v. *Lee,* 419 P.2d 927 (1966); *Keyes* v. *State,* 202 A.2d 582 (1964); *Harlow* v. *United States,* 301 F.2d 361, 366 (5th Cir. 1962).

The other view that the constitutional right to speedy trial attaches once prosecution is initiated has been followed in some jurisdictions. *Hanrahan* v. *United States*, 348 F.2d 363, 366 (D.C. Cir. 1965); *Foley* v. *United States*, 290 F.2d 562, 565 (8th Cir. 1961); *Gossett* v. *Hanlon*, 195 So.2d 865, 869 (Fla. 1967); *Jacobsen* v. *Winter*, 415 P.2d 297, 300 (Idaho 1966); *State ex rel. Fredenberg* v. *Byrne*, 123 N.W.2d 305, 307 (Wis. 1963).

There should be no distinction between arrest and formal charge in right to speedy trial. Historically, it would seem the right to speedy trial was applicable to include pre-indictment periods.

> "The history of the development of the right strongly indicates that it was not designed solely to protect individuals who had been formally charged with a crime. The first written articulation of the right appeared in 1215 in the Magna Carta: 'We will sell to no man, we will not deny or defer to any man either justice or right.'"

Note, *The Right to a Speedy Trial*, 20 Stan.L.Rev. 476, 483 (1968). If the constitutional right to speedy trial were available only after a formal charge, such situations would invite prosecutors to make a nullity of the right. The withholding of formal charges until the end of the statutory period certainly could induce oppressive and vexatious actions designed to circumvent the constitutional right to speedy trial. Note, *Effective Guaranty of a Speedy Trial for Convicts in Other Jurisdictions*, 77 Yale L.J. 767, 780 (1968). It would be quite easy for an accused to be subject to the limitations the court warned of in *United States* v. *Ewell*, 383 U.S. 116, 120 (1966).

"This guarantee is an important safeguard to prevent undue and oppressive incarceration prior to trial, to minimize anxiety and concern accompanying public accusation and to limit the possibilities that long delay will impair the ability of an accused to defend himself." p. 630

It has been said that procedural safeguards, such as the statute of limitations, take care of the pre-indictment period. The problem of using the statute of limitations or a similar statutory device, as a sole safeguard to protect the accused between the time of arrest and the filing of formal charges, is the lack of uniformity in the states and federal jurisdictions. See the A.B.A. Project, *Standards Relating to Speedy Trial,* pp. 14-16 (Appr. Draft, 1968). The federal statute of limitations for non-capital cases is five years. 18 United States Code 3282. The Florida statute of limitations in non-capital cases is two years. 932.05, F.S. The Presidential Commission on Law Enforcement has proposed the period from arrest to trial on felony charges be not more than four months. See Note, p. 14, A.B.A. Project, *Standards Relating to Speedy Trial* (Appr. Draft, 1968). Such variations of the statute of limitations for both state and federal jurisdictions cannot effectively insure the accused the constitutional right to speedy trial since there is no attempt to distinguish between necessary and unnecessary delay. Note, *The Lagging Right to a Speedy Trial,* 51 Va.L.Rev. 1587, 1614 (1965).

The duty to accord Dickey a speedy trial existed because there was authority whereby he could have been returned to Florida for trial even before pronouncement by this court in *Smith* v. *Hooey, supra.* Petitioner never waived

his constitutional right to a speedy trial because of his written requests. The state's actions can be classified as oppressive and vexatious because no attempt was made to honor petitioner's demands. The state cannot hide behind the act of a late filing of the information to defeat the right to speedy trial.

II.

A Delay of Eight Years in Granting Trial Is Denial of the Right to Speedy Trial as Guaranteed by the Sixth Amendment to the Constitution When the Delay Results in Prejudice to the Accused's Defense and Person.

The issue in this case is whether petitioner was prejudiced by an eight year delay in bringing his case to trial. In *Smith* v. *Hooey, supra,* the question of prejudice was discussed:

> " . . . his ability to confer with potential defense witnesses, or even to keep track of their whereabouts, is obviously impaired. And, while 'evidence and witnesses disappear, memories fade, and events lose their perspective,' a man isolated in prison is powerless to exert his own investigative efforts to mitigate these erosive effects of the passage of time."

In *Dickey, supra,* it is stated:

> " . . . it follows that failure of the accusing state to so act might well invalidate any judgment . . . if the time lapse is sufficiently great. . . ." p. 526

The doctrine of prejudice arising to an accused's defense because of long delay has been widely recognized by both

federal and state decisions. *Williams* v. *United States*, 250 F.2d 19 (1957); *United States* v. *Chase*, 135 F.Supp. 230 (1955); *United States* v. *McWilliams*, 163 F.2d 695 (D.C. Cir. 1947); *United States* v. *Provoo*, 17 F.R.D. 183 (D. Md. 1955); *Needle* v. *Scafati*, 289 F.Supp. 1006 (1968); *Jones* v. *State*, 164 So.2d 799 (Miss. 1964); *State* v. *Milner*, 149 N.E.2d 189 (1958); *Bell* v. *State*, 220 So.2d 287 (Miss. 1969); *People* v. *Bryarly*, 178 N.E.2d 326 (Ill. 1961); *Arrowsmith* v. *State*, 175 S.W. 545 (Tenn. 1915); *United States* v. *Richardson*, 291 F.Supp. 441 (1968). Note, *The Lagging Right to a Speedy Trial*, 51 Va.L.Rev. 1587, 1592, 1593 (1965).

In *Taylor* v. *United States*, 238 F.2d 259 (D.C. Cir. 1956), where there was a four year period between the offense and the indictment plus two years of waiting for trial, the Court stated:

> "... and the resulting handicap to the procurement of witnesses who might have supported appellant's alibi, or any other defense, must seriously have handicapped the preparation of a defense ..." p. 262

In *United States* v. *Ewell*, 383 U.S. 116, 15 L.ed.2d 627 (1966), it was held:

> "... and to limit the possibilities that long delay will impair the ability of an accused to defend himself." p. 630

Smith v. *Hooey*, 393 U.S. 374 (1969), states:

> "Finally, it is self-evident that 'the possibilities that long delay will impair the ability of an accused to defend himself' ..."

Note, *The Lagging Right to a Speedy Trial*, 51 Va.L.Rev. 1587, 1591-94 (1965); Note, *Effective Guaranty of a Speedy Trial for Convicts in Other Jurisdictions*, 77 Yale L.J. 767 (1968).

The constitutional right to speedy trial certainly recognizes that an accused should not be prejudiced in his defense. The deputy sheriff who had written the description given by the eyewitness had destroyed his notes. At trial, the eyewitness to the robbery and the deputy sheriff differed on the description given eight years before. The deputy sheriff testified that he had destroyed the only notes containing the description given him by the eyewitness:

> "Q. Where are those notes?
>
> A. I don't know, sir. That has been a long time ago . . . .
>
> Q. So the notes probably indicated much better what—
>
> A. They would indicate exactly what she told me but I don't have them so I'm not going to tell you something that I'm not positive of.
>
> Q. So what you're saying is that after an eight year period it's difficult to recall what she told you?
>
> A. Well, all of it, yes, sir. I do recall some of it, though." (A. 44)

These notes would have resolved the conflict that arose eight years later at trial. Had the trial been earlier, these notes could have established with certainty the description given by the eyewitness.

If the delay results in material evidence being unavailable to the accused, there is sufficient prejudice to indicate

denial of the right to speedy trial. *United States* v. *Provoo,* 17 F.R.D. 183 (D. Md. 1955); *Jones* v. *State,* 164 So.2d 799 (Miss. 1964); *Taylor* v. *United States,* 238 F.2d 259 (D.C. Cir. 1956). When petitioner was finally allowed to go to trial eight years later, one of his defense witnesses had died, and another could not be located. It is obvious that a delay which would result in a witness being unavailable and memories being dulled because of the passage of time, would prohibit an accused from getting a fair trial. In *United States* v. *McWilliams,* 69 F.Supp. 812 (D.D.C. 1946), the Court said:

> "As in all long delayed cases, . . . the memories of witnesses as to events occurring many years ago are not clear. . . . I do not see how these defendants now can possibly obtain fair trials." p. 815

In *Bell* v. *State,* 220 So.2d 287 (Miss. 1969), the Supreme Court of Mississippi followed the doctrine that there had been prejudice to the defense as a result of long delay when witnesses were missing, another had died, and others were not available for trial. Other jurisdictions have also followed this doctrine that there was a constitutional denial of speedy trial where there was prejudice to the defense as a result of witnesses being either dead or missing, where events occurred years ago, and the witnesses were unable to recall accurately. *United States* v. *McWilliams,* 163 F.2d 695 (D.C. Cir. 1947); *United States* v. *Provoo,* 17 F.R.D. 183, 203 (D. Md. 1955); *United States* v. *Chase,* 135 F. Supp. 230 (N.D. Ill. 1955); *Arrowsmith* v. *State,* 175 S.W. 645 (Tenn. 1915); *State* v. *Milner,* 149 N.E.2d 189 (1958); *United States* v. *Richardson,* 291 F.Supp. 441 (1968).

The delay of trial which has resulted in witnesses being dead or scattered over the country, and the inability

of witnesses to remember facts occurring years ago, all are prejudicial to the defense. It may be argued that these factors could easily have hampered the prosecution just as much as the accused. There is a feeling that after lengthy delay the accused would have the advantage because the prosecution would drop the charges. Note, *Continuances in the Cook County Criminal Courts,* 35 U.Chi. L.Rev. 259, 261-62 (1968). While this may be true in some cases, it is detrimental to the guilt determination process regardless of which side secured the better advantage. In *United States* v. *Chase,* 135 F.Supp. 230 (N.D. Ill. 1955), it was observed:

> "While I have not been informed as to how many of the witnesses are available to either side, it can almost be judicially noticed that the passage of that length of time will have made some of them inaccessible . . . . certainly their memories of those long past events are clouded. They could not be said after that length of time to be testifying to what they remember; they would be recalling something as in a dream, a kind of phantasmagoria, rather than an independent recollection. . . . Witnesses, however honest, could not respond with any accuracy to cross-examination, and another important right would thus be lost to petitioner." p. 233

Besides the proposition that both defense and prosecution want a fair trial, the fact is that the community has a vital interest in a speedy trial. A.B.A. Project, *Standards Relating to Speedy Trial* (Appr. Draft, 1968), states at pp. 10-11:

> "From the point of view of the public, a speedy trial is necessary to preserve the means of proving the

charge, to maximize the deterrent effect of prosecution and conviction, and to avoid, in some cases, an extended period of pretrial freedom by the defendant during which time he may flee, commit other crimes, or intimidate witnesses."

Detainers, too, have been recognized as creating prejudice to a prisoner, and as such are within the protection of the Sixth Amendment. Detainers have resulted in confinement in maximum security, loss of prison privileges, loss of desirable jobs, loss of right to honor farm, inability to keep track of the charges, inability to secure evidence in one's favor. Certainly, having a detainer against him for eight years worked unnecessary hardships on Dickey. Schindler, *Interjurisdictional Conflict and the Right to a Speedy Trial,* 35 U.Cin.L.Rev. 179 (1966), 181-183. *Needle* v. *Scafati,* 289 F.Supp. 1006 (1968).

If undue delay itself is sufficient without the necessity of showing prejudice, then the eight years' delay should entitle the accused to be discharged. *United States* v. *Lustman,* 258 F.2d 475, 477-78 (2d Cir. 1958). However, if the constitutional right to speedy trial requires a showing of prejudice, the burden of proof should be on the State rather than the accused.

"Even if he is permitted to discover police documents, many facts within the knowledge of the government may never have been put on paper. And the discovery of police documents will not be of assistance in those cases in which the prosecuting attorney is responsible for the delay. The defendant will still be forced to rely upon potentially hostile government witnesses to

sustain his burden of proof." *The Right to a Speedy Trial,* 20 Stan.L.Rev. 476, 503 (1968).

The doctrine of putting the burden on the prosecutor to show no prejudice has been recognized by both federal and state jurisdictions. In *United States* v. *Dillion,* 183 F.Supp. 541 (S.D.N.Y. 1960), where the defendant was discharged after an eight year delay, the burden was placed on the government. *People* v. *Prosser,* 130 N.E.2d 891, 895 (N.Y. 1955), held that the duty was on the state to protect the accused's right to speedy trial:

> "It is likewise the state which has the duty of seeing that the defendant is speedily brought to trial."

Delay of a trial which results in prejudice to the defense is so detrimental that an individual cannot be assured of having a fair trial.

III.

The Denial of the Right to a Speedy Trial Should Result in Absolute Discharge of Petitioner.

Since the right to a speedy trial exists for only a certain period of time, it would seem that where there has been a denial of this right, absolute discharge is the only solution. Florida has adopted the view that, after three consecutive requests, if trial is not granted, an absolute discharge is in order. See 915.01 and 915.02, F.S.; *Dickoff* v. *Dewell,* 9 So.2d 804 (Fla. 1942).

In A.B.A. Project, *Standards Relating to Speedy Trial* (Appr. Draft, 1968), the American Bar Association has

taken the position that, when there has been denial of speedy trial, the accused should be discharged.

> "The position taken here is that the only effective remedy for denial of speedy trial is absolute and complete discharge. If, following undue delay in going to trial, the prosecution is free to commence prosecution again for the same offense, subject only to the running of the statute of limitations, the right to speedy trial is largely meaningless. Prosecutors who are free to commence another prosecution later have not been deterred from undue delay. See e.g. Brummitt v. Higgins, 80 Okla. Crim. 183, 157 P.2d 922 (1945)." pp. 40-41

Some state and federal courts have followed the doctrine of complete dismissal when trial has been unnecessarily delayed. *State* v. *Artz,* 191 N.W. 605 (Minn. 1923); *Bell* v. *State,* 220 So.2d 287 (Miss. 1969); *United States* v. *Provoo,* 17 F.R.D. 183 (D. Md. 1955); *Pellegrini* v. *Wolfe,* 283 S.W.2d 162 (Ark. 1955); *Jones* v. *State,* 164 So.2d 799 (Miss. 1964); *State* v. *Milner,* 149 N.E.2d 189 (1958); *Williams* v. *United States,* 250 F.2d 19 (D.C. Cir. 1957); *United States* v. *Chase,* 135 F.Supp. 230 (N.D. Ill. 1955); *United States* v. *McWilliams,* 163 F.2d 695 (D.C. Cir. 1947); *United States* v. *Dillion,* 183 F.Supp. 541 (S.D.N.Y. 1960).

Obviously, it is impossible at this late date for petitioner to be accorded a speedy trial. The courts below erred in denying petitioner the relief requested.

Conclusion

For the reasons set out above, the judgment of the Florida District Court of Appeal, First District, should be reversed and petitioner should be discharged from the sentence.

Respectfully submitted,

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December, 1969

APPENDICES

APPENDIX "A"

Stipulation of Facts

A. An affidavit was filed and sworn to by the Deputy Sheriff of Gadsden County, Florida on July 1, 1960, charging petitioner with robbery of Clark's Motor Court in Gadsden County, Florida on June 28, 1960.

B. An arrest warrant was issued by the Justice of the Peace, Gadsden County, Florida on July 1, 1960, charging petitioner with robbery on June 28, 1960. The warrant was based upon the affidavit executed by the Deputy Sheriff of Gadsden County, Florida.

C. The warrant was placed in the hands of the Sheriff of Gadsden County, Florida on July 1, 1960, but was never served on petitioner.

D. Petitioner was in the custody of the United States Federal Government and was incarcerated in the Jackson County Jail, Marianna, Florida on federal criminal charges from July 1, 1960 until September 2, 1960, when he was transferred into federal custody outside the State of Florida. The petitioner was visited in the Jackson County Jail by the eyewitness and the Deputy Sheriff who executed the affidavit. The jailer was present.

E. Petitioner's arrest warrant was sent to Adam Lewis, Chief U. S. Marshal, Atlanta, Georgia on September 2, 1960, and a formal detainer was lodged against the petitioner for the charge of robbery in Gadsden County, Florida. This detainer was processed through the office of the Gadsden County Sheriff's Department. Federal authorities acknowledged that a formal detainer had been lodged against petitioner from September 2, 1960 until petitioner was returned to the State of Florida, and that he was wanted in the State of Florida for the crime of robbery which occurred on June 28, 1960 in Gadsden County, Florida. Petitioner remained in federal custody

outside the territorial limits of the State of Florida from September 2, 1960 until January 23, 1968, when he was returned to the State of Florida to answer the charges of robbery.

F. During the period petitioner was in federal custody, he filed a Writ of Habeas Corpus Ad Prosequendum with the Clerk of the Circuit Court, Gadsden County, Florida on October 29, 1962, requesting the charge be dismissed or that he be returned to the State of Florida to stand trial. The trial court having jurisdiction of this case denied petitioner's Writ on December 1, 1962. Petitioner filed a second Writ, asking for dismissal of the charges or to be returned for trial on April 1, 1963, and the trial court having jurisdiction entered its Order on April 15, 1963, denying the Writ and citing its Order of December 1, 1962. Petitioner then filed a Motion for Speedy Trial or dismissal on March 28, 1966, and it was again denied on April 13, 1966 by the trial court having jurisdiction. Petitioner then filed original Mandamus proceedings in the Supreme Court of Florida and, in an Opinion dated June 14, 1967, in *Dickey* v. *Clerk of the Circuit Court of Gadsden County,* 200 So.2d 521, the Supreme Court of Florida indicated that the State of Florida should initiate proceedings to have petitioner brought back for trial or that the detainer should be withdrawn. The Supreme Court of Florida held that the petitioner had the right to reassert his demands in a new petition naming the proper prosecuting authority. Petitioner filed a Petition for Dismissal, dated September 1, 1967, claiming that his right to a speedy trial had been denied him as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States of America, and he named in this petition the proper prosecuting authority.

The State Attorney, Second Judicial Circuit, filed with the trial court having jurisdiction of this matter, a Petition for a Writ of Habeas Corpus Ad Prosequendum, requesting that the court enter its order to have the petitioner returned to the State of Florida to stand trial for

the June 28, 1960 robbery charges. The hearing was held ex parte. The trial court having jurisdiction, in an order dated December 15, 1967, ordered the petitioner to be returned to Florida on January 23, 1968 to answer the charges against him.

G. On January 23, 1968, the Public Defender's Office, Second Judicial Circuit, was appointed to represent petitioner. At this time petitioner entered a plea of not guilty, and trial was scheduled for January 31, 1968. On January 30, 1968, petitioner, through his attorneys, filed a Motion for Continuance, stating that petitioner was unable to locate two material witnesses to his defense, A. D. Bud Strickland of Savannah, Georgia and E. D. Dolan of Jacksonville, Florida. Strickland would have testified that petitioner, on the night of the robbery, was in Waycross, Georgia, a town approximately 175 miles east of the town where the robbery was committed; and Dolan would have testified that petitioner had been in Clark's Motor Court on a number of occasions prior to the robbery and would not have robbed Mrs. Clark since she, in fact, knew and could have recognized him. An affidavit dated January 31, 1968, executed by petitioner, stated that a material witness, Mrs. Hazel Varnadore, who had died in 1964, would have testified that petitioner was in Waycross, Georgia on the night the crime was committed, and petitioner had placed a telephone call to her in Florida around twelve midnight. The State did not traverse the allegations in the Motion for Continuance, which was sworn to by petitioner's attorney. Petitioner filed a Motion to Quash, dated January 30, 1968, alleging that he had been denied the right to a speedy trial, based upon the Sixth and Fourteenth Amendments to the United States Constitution.

H. Petitioner filed a second Motion for Continuance on February 9, 1968 for the trial which was scheduled on February 13, 1968, on grounds that Bud Strickland could not be located. The motion was sworn to by petitioner's attorney and was not traversed by the State. The court, on February 13, 1968, denied the second Motion for Continu-

ance and Motion to Quash, and ordered the petitioner to trial on that date.

I. During the course of the trial, Mrs. Clark had testified that she had visited the Jackson County Jail, Marianna, Florida, in the company of the Deputy Sheriff and the jailer from Gadsden County, and had identified petitioner as the person who had robbed her. Petitioner was alone in a cell. Prior to visiting the jail, Mrs. Clark, the eyewitness to the crime, had been told by the Deputy Sheriff who executed the affidavit that the petitioner was incarcerated in the Jackson County Jail, and the deputy had shown a picture of the petitioner to Mrs. Clark. The Deputy Sheriff testified that the jailer, who was present when Mrs. Clark, the eyewitness, had identified petitioner as the person who robbed her, had since died and was not available for the trial. The Deputy Sheriff also testified that Mrs. Clark, the eyewitness, had given him a description of the robber and that he had written this description down and had used this written description for a radio broadcast, but after several years he had destroyed the notes containing the description.

J. Petitioner was tried by a jury and convicted of robbery, and the court sentenced petitioner to serve ten years in the state penitentiary at hard labor, sentence to run consecutively to any sentence at which petitioner is presently serving. The maximum penalty for robbery in the State of Florida is life imprisonment.

K. Petitioner appealed the judgment of conviction to the First District Court of Appeal, State of Florida, and raised the constitutional question that petitioner's Sixth and Fourteenth Amendment rights to a speedy trial had been denied. The First District Court of Appeal, State of Florida, ruled on the constitutional question and affirmed petitioner's conviction. Petitioner duly filed Petition for a Writ of Certiorari to this Court.

L. The first motion for continuance was granted by the court on January 31, 1968.

APPENDIX "B"

Florida Statutes

915.01 SPEEDY TRIAL; REDUCTION OF BAIL; DISCHARGE OF PRISONER.

(1) When a person has been committed to custody to answer any criminal charge, and shall apply to the court on the first day of the term to which he has been committed, that he desires to be brought to his trial before the end of the term, and shall not be indicted or informed against at that term, unless it appear to the satisfaction of the court that the witnesses could not be procured, the court shall set him at liberty upon his giving bail in a reasonable penalty to appear at the next term. If the person in custody be not indicted or informed against in the second term, unless the attendance of witnesses is prevented by himself, he shall be discharged from imprisonment; and if he is not tried at or before the third term after the date he is first committed, he shall be forever discharged from the crime.

(2) When a person has been arrested and released on bond, and thereafter for three successive terms of court, files a written demand for trial (serving a copy on the prosecuting attorney) and he is not brought to trial at or before the third full term after the date he is first committed, he shall be forever discharged from the crime; provided, however, the attendance of the witnesses is not prevented by himself, and he has filed no pleading seeking a continuance.

915.02 SPEEDY TRIAL FOR PERSONS SERVING TERMS OF IMPRISONMENT.

Any person serving a sentence or sentences of imprisonment for crime in this state who has a charge of crime pending against him in this state and who, while impris-

oned under such sentence or sentences, files in the court having jurisdiction to try said charge, on or within thirty days before the first day of each of three successive terms thereof, a written demand for trial, serving a copy upon the prosecuting attorney and who is not brought to trial by the end of the third of such terms, shall be forever discharged from the said crime; provided that the attendance of the witnesses is not prevented by him; provided that any term of court during which a continuance has been granted for good cause shown to either the accused or the state shall not be counted in computing the three terms.

Certificate of Service

I HEREBY CERTIFY that a copy of the foregoing Brief for the Petitioner has been forwarded by mail to Honorable George R. Georgieff, Assistant Attorney General, Capitol Building, Tallahassee, Florida, Attorney for Respondent, this 28 day of November, 1969.

JOHN D. BUCHANAN, JR.